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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1030

HARRY W. RODGERS, III.,
ERNEST N. CORY, JR.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Harry W. Rodgers, III, and Ernest N. Cory, Jr. ("petitioners") hereby petition for a writ of certiorari to review the *per curiam* affirmance by an equally divided United States Court of Appeals for the Fourth Circuit of the judgments of conviction entered by the United States District Court for the District of Maryland, at Baltimore, in *United States of America* v. *Marvin Mandel, et al., Criminal* No. 75-0822.

OPINIONS BELOW

The *per curiam* order of the court of appeals in response to a petition for further rehearing *en banc* and the dissenting opinions of Judges Widener, Rus-

sell and Murnahgan (Pet. App. 1a-5a)* are not yet reported. The *per curiam* order of the court of appeals on rehearing *en banc* and the dissenting opinion of Judges Widener and Russell (Pet. App. 6a-15a) are reported at 602 F.2d 653. The opinion of the panel of the court of appeals and the dissenting opinion (Pet. App. 17a-88a) are reported at 591 F.2d 1347.

JURISDICTION

The judgment of the panel of the court of appeals (Pet. App. 16a) was entered on January 11, 1979. The *per curiam* order of the court of appeals *en banc* (Pet. App. 7a) was entered on July 20, 1979. On November 1, 1979, the *en banc* court of appeals denied a timely petition for further rehearing *en banc* (Pet. App. 1a). On November 20, 1979, Chief Justice Warren E. Burger extended the time for filing a petition for a writ of certiorari to December 31, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether an equally-divided *en banc* court of appeals, which has granted rehearing *en banc* under 28 U.S.C. § 46(c) without vacating the judgment of the court of appeals panel, must affirm the panel's outstanding judgment rather than the district court's judgments of conviction, which the panel had set aside.

2. Whether the prosecution and convictions of petitioners under the federal mail fraud statute, 28 U.S.C. § 1341, for failure to disclose certain information, the non-disclosure of which was at the time ac-

* "Pet. App." refers to the Appendix to the certiorari petition filed in this case by Marvin Mandel, W. Dale Hess, William A. Rodgers, and Irvin Kovens.

cepted practice of a state agency and state legislature, constituted an impermissible extension of the intended reach of that federal statute (and, as such, also served as an invalid basis for conviction under the anti-racketeering statute, 18 U.S.C. § 1962).

3. Whether the failure of the trial court to instruct the jury on the law of bribery in connection with the mail fraud charges (18 U.S.C. § 1341) was fatal error in the circumstances of the instant prosecution.[1]

STATUTES INVOLVED

Section 46(c), United States Code, Title 28, provides as follows:

> (c) Cases and controversies shall be heard and determined by a court or panel of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. The court in banc shall consist of all circuit judges in regular active service.

Section 1341, United States Code, Title 18, provides as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obli-

[1] The certiorari petition filed by the other co-defendants (*Mandel, et al.* v. *United States*) raises two issues under the Sixth Amendment confrontation clause and Federal Rule of Evidence 803(24) regarding hearsay testimony introduced at trial. Petitioners Rodgers and Cory hereby join that certiorari petition on those two issues for the reasons stated therein.

> gation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Section 1962(b), United States Code, Title 18, provides as follows:

> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

STATEMENT

Petitioners were convicted in United States District Court for the District of Maryland on 15 counts of mail fraud under 18 U.S.C. § 1341 and one count of racketeering under 13 U.S.C. § 1961 *et seq.*[2] Petitioner

[2] The indictment had charged petitioners with 20 counts of mail fraud. After the jury returned verdicts of guilty on 17 of these counts and verdicts of not guilty on the three others, the district court entered judgments of acquittal on two additional counts.

The indictment had also charged petitioner Rodgers with two counts of racketeering (Counts 23 and 24) and Petitioner Cory with one (Count 24). After the jury returned verdicts of guilty on both Counts 23 and 24, the district court entered a judgment of acquittal on Count 23.

Rodgers was sentenced to a term of four years' imprisonment, Cory to a term of 18 months; each was ordered to forfeit his ownership interest in Southern Maryland Agricultural Association, Inc.[3] The judgments of conviction were reversed and the forfeiture orders vacated by a three-judge panel of the United States Court of Appeals for the Fourth Circuit (Pet. App. 17a-66a). At the Government's request, the case was reheard *en banc,* and the judgments of conviction were "affirmed by an equally divided court."[4] A request by all defendants for further rehearing *en banc* was denied, again by an equally divided court.[5]

The crux of the prosecution was that petitioners Rodgers and Cory joined with others, including the then Governor of the State of Maryland, Marvin Mandel, in an alleged scheme to defraud the Maryland State Racing Commission, the Maryland General Assembly, and ultimately the citizens of Maryland "of the right to conscientious, loyal, faithful, disinterested and honest government."[6] The charges arose after friends and associates of Governor Mandel acquired controlling interests in the Marlboro Race Track ("Marlboro") in Maryland in December 1971.

[3] This corporation owns and operates the Marlboro and Bowie race tracks in the State of Maryland.

[4] The *per curiam* order (Pet. App. 7a) did not mention the forfeiture orders entered in district court and vacated by the panel and did not expressly vacate the panel opinion. Neither did the order granting rehearing *en banc* expressly vacate the panel opinion. See note 22 *infra.*

[5] Pet. App. 1a-5a.

[6] *United States* v. *Mandel,* 591 F.2d 1347, 1359 (4th Cir. 1979) (Pet. App. 32a).

The government advanced two principal theories in support of conviction.[7] The first was that petitioners participated in a scheme involving use of the mails for bribery or attempted bribery of Governor Mandel. The second was that petitioners participated in a scheme involving use of the mails fraudulently to misrepresent to, or conceal from, the Maryland Racing Commission and the General Assembly the identities of the true, or "beneficial," owners of Marlboro. Each alleged scheme was devised, according to the government, to secure administrative and legislative actions that would enhance the profitability of Marlboro and thus reap financial benefits for petitioners.

The facts underlying each of the government's theories are summarized in the panel opinion below (Pet. App. 21a-27a). The government established—indeed no one denied—that Governor Mandel received gifts at various times from petitioner Rodgers and several other co-defendants (Pet. App. 25a), and that petitioner Rodgers and several co-defendants decided intentionally not to reveal to the Racing Commission or the General Assembly that they were the beneficial owners of Marlboro throughout the 1972 legislative session (Pet. App. 22a). As the panel opinion observes, these facts "were essentially uncontroverted. The dispute centered on the proper inferences that could be drawn from these facts" (Pet. App. 21a).

[7] The panel opinion treats the two alleged "schemes" outlined in this paragraph—bribery and concealment—as independent rationales for conviction on the mail fraud charges (Pet. App. 43a). The racketeering charge of which petitioners were convicted (Count 24) was based on identical rationales (Pet. App. 21a, 66a).

To establish its bribery theory, the government introduced evidence that several co-defendants had individually and sometimes collectively given items of value to the Governor and his wife over the six-year period between 1970 and 1975 (Pet. App. 25a). The alleged *quid pro quo* was asserted attempts by the Governor during the 1972 legislative session to influence the General Assembly first to override his veto the year before of a bill that would have added racing days to Marlboro's schedule[8] and later to vote favorably on a bill (the "consolidation bill") that would have enabled Marlboro to conduct its racing days at a larger, more profitable track elsewhere in Maryland (Pet. App. 25a).

The government was unable, however, to produce any evidence connecting the so-called "flow of benefits" to the Governor with any actions taken by him with respect to the veto override or the consolidation bill.[9] With respect to petitioners, there was nothing to support an inference of bribery. The evidence demonstrated that all but one of petitioner Rodgers' gifts to the Governor were made either well before Rodgers acquired any interest in Marlboro or well after the 1972 legislative session.[10] And there was no allegation,

[8] Much of the evidence supporting this proposition consisted of hearsay testimony by various members of the legislature that other members and persons had told them Mandel wanted the veto overridden (Pet. App. 48a-52a). The introduction of this testimony was vigorously opposed at trial and on appeal. See note 1, *supra*.

[9] There was no evidence, for example, that any of the co-defendants ever convened or discussed or agreed on a gift-giving campaign in return for official favors.

[10] Rodgers and Mandel had a long-standing relationship that preceded Mandel's election as Governor. Rodgers' gifts included a bracelet he co-purchased for Barbara Mandel in 1970; payment

nor evidence, that petitioner Cory was implicated in any of the so-called acts of bribery or even aware of them. Ultimately the prosecution appeared to abandon its bribery theory; at the close of trial, it successfully opposed the defendants' requested instructions to the jury on the law of bribery in connection with the mail fraud charges (Pet. App. 9a-10a).

To establish its theory of misrepresentation or concealment, the government introduced evidence that petitioner Rodgers failed to disclose his identity as a beneficial owner of Marlboro to the Racing Commission or the General Assembly during the 1972 legislative session. Petitioner Cory was shown to have written two letters to the Commission early in 1972 concerning ownership of Marlboro. The individuals listed on the first of these letters (GX 97(a)) were all beneficial owners in fact, with the exception of petitioner Cory, who was listed as holding shares as "attorney." The individuals listed on the second letter (GX 12) included three nominees, though not designated as such, for those stockholders not wishing to be identified. Several Senators testified that knowledge of the identities of the undisclosed beneficial owners would have influenced their decisions whether to vote to override Governor Mandel's veto or to support the consolidation bill (Pet. App. 23a).

The defense introduced evidence that it was the Racing Commission's long-standing practice to permit beneficial owners of racetracks to preserve their

for the Governor's stay at a house in Florida in 1973; a disputed discount on life insurance in 1973; and assistance in procuring a loan in 1974. The only so-called act of bribery that occurred during the 1972 legislative session was the purchase of clothing at a men's store (Pet. App. 25a).

anonymity by reporting such ownership in the names of nominees. This was the testimony of the Deputy Attorney General of Maryland who advised the Commission respecting disclosure requirements and other matters (Tr. 7631). The Executive Secretary of the Racing Commission agreed, testifying further that stockholder lists furnished to the Commission never designated whether particular individuals were nominees or beneficial owners, and that the Commission never inquired into such matters (Tr. 9851-9853, 9855-9856).[11] Members of the Senate testified that they were fully aware of the practice of nondisclosure and understood that the Commission's records in many instances did not reflect the beneficial owners of the stock.[12] Several Senators went on to explain that such information is, or at least should be, immaterial to their decision-making with regard to racetrack legislation (Tr. 4957-4958, 7373-7376). It was readily acknowledged that neither the Senate as a whole nor individual Senators inquired beyond the Commission's files to determine the beneficial owners of Marlboro during the 1972 legislative session, despite persistent rumors that petitioner Rodgers, among other friends and associates of Governor Mandel, was financially involved.[13]

Petitioner Rodgers testified that he had relied on the Commission's practice in choosing a course of con-

[11] The evidence demonstrated that after the legislature in 1974 amended the statute governing disclosure to require identification of beneficial owners, petitioners timely complied by doing so during the next audit by the Racing Commission (Tr. 9854).

[12] Tr. 4797-4799, 4804-4805, 4992-4993, 5386-5389, 7723-7724, 7782-7783, 7810-7812, 7856-7857.

[13] Tr. 4797-4799, 4804-4805, 4992-4993, 5386-5389.

fidentiality. Rodgers explained that because he was concerned about the political ramifications of disclosure he asked his attorney, petitioner Cory, to verify the practice; that Cory advised him the Commission had confirmed the practice of using nominees; and that accordingly he believed he was steering a course within the law (Tr. 10005-10009, 10025-10026). The Executive Secretary of the Racing Commission confirmed that petitioner Cory's letters complied fully in form and content with the requirements of both the Commission and the General Assembly under accepted administrative practice in the State of Maryland at the time (Tr. 9855-9858).

At the close of trial, the district court rejected the defense request for a charge explicating the law of bribery (Pet. 43a). The district court also rejected, without explanation, a request by the defense for a charge that compliance with state law was a defense (Tr. 11567-11569). Both before the jury retired and after it returned its verdict, the district court denied motions for judgment of acquittal made on grounds that no bribery had been demonstrated and that the evidence conclusively established that petitioners were under no duty to disclose the beneficial owners of Marlboro.

On appeal to the Fourth Circuit, the panel majority reversed petitioners' mail fraud convictions for error in the jury charge, holding that the defendants were entitled to the requested instruction on bribery [14] (Pet.

[14] The panel also held that Governor Mandel was entitled to a charge, not given below, that he could not be found guilty unless he knew that some or all of the other defendants were among the

App. 43a-44a). Since the theory of defense, supported by evidence, was that petitioner Rodgers and certain other defendants had made gifts to the Governor as a gesture of "goodwill," the panel held specifically that the district court was required to instruct the jury that "[t]he crucial distinction between 'goodwill' expenditures and bribery is . . . the existence or nonexistence of criminal intent that the benefit be received by the official as a *quid pro quo* for some official act, pattern of acts, or agreement to act favorably to the donor when necessary" (Pet. App. 43a).

The panel rejected, however, petitioners' contention that compliance with state law precluded prosecution under the mail fraud statute, 18 U.S.C. § 1341 (Pet. App. 27a-42a), and held specifically that in this case "non-disclosure or concealment, or both, of material information satisfies the fraud element of the mail fraud statute and, thus, is cognizable as a 'scheme or artifice to defraud'" under the mail fraud statute (Pet. App. 39a). In so holding, the panel relied on a series of court of appeals decisions establishing that prosecution under § 1341 is permissible even if defendants' conduct is *not prohibited* by state law, provided that their conduct is "contrary to public policy and conflicts with accepted standards of moral uprightness, fundamental honesty, fair play and right dealing" (Pet. App. 34a-41a).

beneficial owners of Marlboro in 1972 (Pet. App. 44a); that the receipt of certain hearsay testimony that the Governor was behind efforts to have his veto overridden was error requiring reversal in the context of the case as a whole (Pet. App. 48a-53a); and that petitioners' convictions on Count 24 (racketeering) must be reversed because they were dependent on the mail fraud convictions (Pet. App. 66a).

The judgment of the panel, filed together with its opinion, provided

> that the judgments of acquittal on Count 23 of the indictment are affirmed.[15] The judgments of conviction on such other counts of the indictment as to which the defendants were not acquitted or which were not dismissed are vacated and remanded for a new trial; the order of forfeiture is also vacated and remanded consistent with the opinion of this Court filed herewith.

Pet. App. 16a.

The government successfully petitioned for *en banc* reconsideration of the panel decision.[16] Six of the seven active circuit judges then sitting took part in the rehearing.[17] Following briefs and oral arguments the court issued the following *per curiam* opinion (Pet. App. 7a):

> The judgments of conviction are affirmed by an equally divided court.
>
> A majority of the members of the *en banc* court would affirm the judgments of conviction against

[15] Count 23 was one of the two racketeering counts concerning petitioner Rodgers, but not petitioner Cory. *See* note 2, *supra*. The government had challenged the judgment of acquittal on appeal. *See* Pet. App. 61a-66a.

[16] As the accompanying Petition for Mandamus filed on this date notes, the government directed its petition for rehearing only to those portions of the panel's opinion and judgment that dealt with reversible errors committed with respect to the jury instructions and admission of evidence. No rehearing was sought concerning the panel's determinations that (a) affirmed the judgments of acquittal on Count 23 and (b) vacated the order of forfeiture (Pet. for Mandamus at 8-9). *See also* dissenting opinion of Judge Widener (Pet. App. 14a-15a).

[17] One Circuit Judge recused himself from sitting on the case.

> all of the contentions of the appellants except the claim of error in the charge to the jury which was the point upon which there was equal division.
>
> *Affirmed.*

This opinion was accompanied by an equally succinct order "that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed." (Pet. App. 6a). Judge Widener dissented (Pet. App. 8a-15a), further explaining his position as author of the majority opinion of the panel and questioning the failure of the full court to address on rehearing other issues presented in the original appeal, "some of which may present possible grounds for reversal" (Pet. App. 15a). *See* note 16 *supra*.

A petition was then filed on behalf of all the defendants requesting further rehearing *en banc*, particularly in light of the appointment to the Fourth Circuit of two new judges since the initial rehearing *en banc*. This petition was denied in a brief order issued by Chief Judge Haynsworth, which indicated that fewer than a majority of the active judges voted in favor of further reconsideration (Pet. App. 1a). Judge Murnaghan, joined by Judge Russell, filed a separate statement revealing that the circuit judges were evenly divided, four to four, on the question of further rehearing *en banc* (Pet. App. 2a). Both he and Judge Widener, who dissented separately from the denial of further rehearing *en banc* (Pet. App. 5a), expressed grave concern over whether justice, or its appearance, was served by affirmance of judgments of conviction by an equally divided court (Pet. App. 3a-4a, 5a).

REASONS FOR GRANTING THE WRIT

I. The Equal Division Of The En Banc Court Of Appeals Should Have Resulted In An Order Affirming The Judgment Of The Panel, Which Had Vacated Petitioners' Convictions [18]

More than a decade and a half ago, this Court described the power of a federal court of appeals to sit *en banc* pursuant to 28 U.S.C. § 46(c) as "necessary and useful." *Western Pacific Railroad Case,* 345 U.S. 247, 260 (1953). Over the years, as the number of circuit judgeships multiplied in response to the enormous growth in federal appellate litigation, it has become all the more apparent that the *en banc* power is necessary to maintain uniformity within the circuits and to decide questions of exceptional importance—the circumstances that normally give rise to the con-

[18] Since the question presented in this section concerns the validity of the judgment entered by the *en banc* court of appeals, we believe it is properly presented in a petition for a writ of certiorari to review that judgment. In the past, this Court has decided, on writs of certiorari, questions involving the power, authority and procedures of *en banc* courts of appeals. *See, e.g., Textile Mills Securities Corp.* v. *Commissioner,* 314 U.S. 326 (1941); *Western Pacific Railroad Case,* 345 U.S. 247 (1953); *United States* v. *American-Foreign S.S. Corp.,* 363 U.S. 685 (1960). Indeed, the Court has granted certiorari in a case presenting an issue quite similar to that involved here. *See Drake Bakeries, Inc.* v. *Local 50,* 368 U.S. 975 (1962) and note 20 *infra.* However, in the event we are mistaken on this score, both petitioners have joined in the Petition for a Writ of Mandamus filed simultaneously with this certiorari petition (*Mandel, et al.* v. *En Banc Court of Appeals*).

In the event the Court agrees with our view that the issue presented in this section should be considered on writ of certiorari, and thus grants the Petition for Mandamus treating it as a certiorari petition, we respectfully request that the Court also grant this Petition for Certiorari, at least with respect to the first question presented, in order to allow counsel for these petitioners to participate with counsel for the other mandamus petitioners in briefing and oral argument.

vening of an *en banc* court. *See Moody* v. *Albemarle Paper Co.,* 417 U.S. 622, 626 (1974); Rule 35(a), Fed. R. App. Pro.

While the courts of appeals have discretion to decide whether to sit *en banc,* when an *en banc* court does hear or rehear a case, the responsibility for ensuring that it has followed the applicable standards and for defining those standards "lies with this Court." *Western Pacific Railroad Case, supra,* 345 U.S. at 260. The question presented in this case, concerning as it does the power of an equally-divided *en banc* court with respect to an outstanding judgment of a court of appeals panel, is therefore this Court's responsibility to decide.[19] Indeed, no other forum is available.

Moreover, there is a conflict in the courts of appeals on the issue presented here. Sitting *en banc,* the United States Court of Appeals for the District of Columbia Circuit has held—correctly we believe—that when, as in the instant case, an *en banc* court divides equally and has not previously vacated the panel judgment by a majority vote, no action of the *en banc* court can affect that judgment. *Bulluck* v. *Washington,* 468 F.2d 1096, 1122 (1972) (*per curiam*). Either the panel judgment must be affirmed by the equally-divided *en banc* court or the order granting rehearing must be vacated, as the court did in *Bulluck.*[20]

[19] The Court has sought to fulfill its responsibility to oversee the exercise of *en banc* authority in courts of appeals in the cases cited in note 18, *supra.* See also *Moody* v. *Albemarle Paper Co., supra.*

[20] In *Drake Bakeries Inc.* v. *Local 50,* 294 F.2d 399, 400 (2d Cir. 1961), the court of appeals *en banc* split 3-3. The panel opinion had reversed the district court's order (287 F.2d 155) and four of the *en banc* judges concluded that under such circumstances the order

Here, however, the Fourth Circuit, sitting *en banc,* followed neither course. By disregarding the panel judgment, which remains to this day unvacated, and purporting to affirm the judgments of the district court, it exceeded its *en banc* powers under Section 46(c) and in so doing created a conflict with the D.C. Circuit, a conflict this Court alone can resolve.

Section 46(c) "commits the *en banc* power to the majority of active circuit judges," *Western Pacific Railroad Case, supra,* 345 U.S. at 261. As in any other federal appellate court, including this Court, the judgment under review by an *en banc* court of appeals can be set aside only by majority vote. At least since *The Antelope,* 10 Wheat. 66 (1825), it has been clear that an equally divided federal court can settle nothing. *See Neil* v. *Biggers,* 409 U.S. 190, 191-192 (1972); *Etting* v. *Bank of the United States,* 11 Wheat. 59, 78 (1826) ("the principles of law which have been argued, cannot be settled; but the judgment is affirmed, the court being divided in opinion upon it").

As the Court explained in *Neil* v. *Biggers, supra,* 409 U.S. at 378-379, "it is the appellant or petitioner who asks" that the judgment be overturned. But when "the judges are divided, *the reversal cannot be had,* for no order can be made." *Durant* v. *Essex Co.,* 7 Wall. 107, 112 (1869) (emphasis added). Although in such circumstances the court will usually enter a judg-

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of the district court must be affirmed. However, Judges Friendly and Lumbard were of the view that the opinion of the panel "remains in effect and should not be withdrawn." 294 F.2d at 400. The issue was presented to this Court on writ of certiorari, but petitioner abandoned it at briefing and oral argument and the Court reversed on other grounds. 370 U.S. 254, 255 n.1 (1962).

ment of affirmance, this is merely a convenient mode of expressing the court's inability to act. The "legal effect would be the same if the appeal, or writ of error, were dismissed," *Durant* v. *Essex Co., supra,* 7 Wall. at 112, which is why the affirmance has no precedential weight. *Neil* v. *Biggers, supra,* 409 U.S. at 379.

In the case at hand, the appellate proceeding that resulted in an equal division was a rehearing *en banc* from the panel judgment, initiated at the behest of the government as "petitioner". Under the decisions discussed above, an affirmance by the *en banc* Fourth Circuit should have had the same effect as if the petition requesting *en banc* rehearing had been dismissed (*see Bulluck* v. *Washington, supra*). Obviously, it did not. Rather, by ordering the affirmance of the judgments of the district court, the equally divided *en banc* court of appeals in effect reversed the decision of the Fourth Circuit panel—the only decision that the *en banc* court had before it for review. It then gave the complaining petitioner—the government—the result it sought as fully as if the position advanced by the government on rehearing had commanded a majority of the active circuit judges then sitting. Rather than settling nothing, the stalemated *en banc* court thus purported to settle everything that was before it.[21]

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[21] The status quo at the time of rehearing *en banc* was the unvacated panel judgment. That judgment had a number of aspects: it not only vacated the judgments of conviction, but also vacated the district court's separate order of forfeiture and unanimously affirmed the judgments of acquittal on Count 23. The *en banc* court's judgment, however, purports to affirm only the district court's judgments of conviction. It makes no mention of the forfeiture order and it does not address the judgments of acquittal on Count 23. See note 16 *supra.*

It is no answer to say that the grant of the government's request for rehearing *en banc*[22]—the only action in this case taken by a majority of the *en banc* court—must have had the effect of vacating the panel's judgment. A decision to set aside the judgment of the court of appeals panel would have been a decision on the merits, as the District of Columbia Circuit recognized in *Bulluck* v. *Washington, supra,* 468 F.2d at 1122; no such disposition may properly be inferred from the order granting rehearing *en banc.*[23] As this Court held in *Moody* v. *Albemarle Paper Co., supra,* 417 U.S. at 627, "voting *on the merits* of an in banc case is quite different from voting *whether to rehear* a case in banc, which is essentially a policy decision of judicial administration."

The panel's judgment represents a valid appellate adjudication of the case. Since it has not been overturned by majority vote of the full court on rehearing *en banc,* it remains the decision of the court of appeals

[22] The court's order granting rehearing *en banc* (April 16, 1979) reads as follows:

> The appellee's petition for rehearing and suggestion for rehearing en banc along with the response to the petition have been submitted to the court. Upon a poll, a majority of the judges eligible to vote, voted to grant rehearing en banc,
>
> IT IS, therefore, ORDERED that rehearing en banc is hereby granted.
>
> IT IS FURTHER ORDERED that the above cases will be reheard at the June 1979 Session.

[23] As discussed in the Petition for Mandamus (*Mandel, et al.* v. *En Banc Court of Appeals*) filed simultaneously with this Petition, the Fourth Circuit has no published rule, no standing order and no uniform practice that would support a conclusion that an order granting rehearing *en banc* automatically vacates the panel's judgment.

and should have been affirmed by the equally divided *en banc* court.[24]

II. The Federal Mail Fraud Statute Imposes No Independent Federal Duty Of Disclosure When Non-Disclosure Is Permissible As A Matter Of State Law And Accepted Practice

The prosecution and convictions of petitioners Harry Rodgers and Ernest Cory depend upon an impermissibly expansive reading of the federal mail fraud statute, a reading that goes well beyond the limits intended by Congress and conflicts with the decision of another court of appeals.

The mail fraud statute declares unlawful the use of United States mails in connection with, or in furtherance of, "any scheme or artifice to defraud." 28 U.S.C. § 1341. Here the alleged "scheme" was to defraud the citizens of Maryland "of the right to conscientious, loyal, faithful, disinterested and honest government." *United States* v. *Mandel,* 591 F.2d 1347, 1359 (1979). Such a theory of federal prosecution sets this case apart from what has traditionally been regarded as conduct comprehended by the mail fraud statute.

Petitioners may have been convicted of a crime *solely* because of a failure to disclose in mailings to the Maryland State Racing Commission and the Maryland General Assembly in 1972 all of the true, or "benefi-

[24] To be sure, the decision of the panel in this case reflected the views of only two of the nine active judges on the Fourth Circuit—a circumstance that makes it no less the decision of the court of appeals. The presumably contrary views of the members of the *en banc* court were shared by only three of the nine active circuit judges.

cial", owners of Marlboro Race Track.[25] Their questioned conduct related to two letters, written by petitioner Cory, which listed certain of the beneficial interests in the racetrack in the names of nominees, including petitioner Cory as "Attorney."[26]

Any mail fraud prosecution based on the non-disclosure of facts, as opposed to affirmative misrepresentation, gives rise to serious dangers of abuse. Yet, it appears that such cases are being brought with increasing frequency in recent years. They are easy cases to make. Most citizens, if they carefully examined their affairs, could point to some instance in which they failed to disclose something in connection with a mailing. Credit card applications failing to list a minor debt are a common example.

But Congress could not have intended to transform every non-disclosure into a five-year felony. Fraud, as the cases often say, may be difficult to define; its meaning is not, however, whatever a particular prosecutor deems it to be for a particular case. To be kept within

[25] The court of appeals panel held that the jury, if properly instructed, could have based its verdicts on either a scheme involving bribery or a scheme "involving non-disclosure or concealment, or both" (Pet. App. 39a, 43a).

[26] See GX 97(a) and GX 12. Cory had previously supplied the same information to James Callahan by telephone. *See* GX 90(b). Evidence also was introduced indicating that Cory assisted Eugene Casey, one of the beneficial owners of Marlboro, in writing a letter to the Maryland General Assembly in January, 1972, shortly after Casey was appointed Marlboro's president. In that letter Casey stated that he had acquired ownership of the racetrack and requested the Maryland General Assembly to override Governor Mandel's veto of House Bill 1128. None of the other beneficial owners of Marlboro was disclosed. *See* GX 4; Trial Tr. 4433-38, 6583-84.

some reasonable bounds, actionable fraud under the mail fraud statute in non-disclosure situations must be limited to omissions of facts that are *material.* And whether a fact is material necessarily depends upon the significance attached to it by the person or agency to whom it allegedly should have been disclosed.

In this case, the disclosure was to be made to an agency of the State. Yet the agency itself did not consider the omitted facts significant and indeed had a long-standing and generally known practice of not requiring their disclosure. Indeed, on this point the record below could not be clearer. It establishes unequivocally that in 1972, and for years before that, the Maryland State Racing Commission knowingly and intentionally permitted the beneficial owners of stock in racetracks to protect their anonymity by reporting such ownerships in the names of nominees.[27] Moreover, it was perfectly acceptable for beneficial owners to file such reports without indicating that the names they supplied were in fact nominees.[28] So long as it was

[27] See the testimony of James A. Callahan, Executive Secretary of the Commission. Trial Tr. 9851-53, 9855. The same point was made by Jon Oster, Deputy Attorney General of the State of Maryland and the lawyer who advised the Racing Commission. Trial Tr. 7629-31. Another member of the Racing Commission, Milton Pollenger, also confirmed the practice. Trial Tr. 8064-71. *See also* Art. 16, Sect. 198, Anno. Code of Maryland (1957), replacement volume 2A.

[28] In this regard, the Executive Secretary of the Commission testified that until 1974, when the legislature amended the statute governing disclosure (see n.4, *supra*), the Commission had never inquired into whether the names provided on any list of stockholders signified nominees or beneficial owners, or both. Trial Tr. 9849-59.

affirmatively represented that no one associated with the racetrack was involved in a criminal enterprise or in bookmaking—a representation properly and accurately included in Cory's correspondence in the instant case—the Commission was satisfied with the listing.[29] Indeed, at no time before enactment of the 1974 disclosure law did the Commission indicate that it regarded the identity of beneficial owners material to its functions.[30]

Furthermore, throughout the period in question the Maryland General Assembly was fully aware of, and acquiesced in, the Commission's practice. The members of the Senate who were questioned at trial on this subject testified that they knew of the non-disclosure practice and understood that the Commission's records in many instances did not reflect the beneficial owners of stock.[31] Several Senators went on to explain that such

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[29] J. Newton Brewer, Jr., then Chairman of the Department of Licensing and Regulation, Maryland Racing Commission, so advised the then Chairman of the State Senate Finance Committee, by letter dated October 10, 1973, stating that the concern of the Commission was that the controlling interest in any trade not be held by "a person who is a bookmaker or who has been connected with organized crime." GX 92(a).

[30] In 1974, the Maryland General Assembly enacted a new disclosure law requiring that beneficial interests in racetracks be affirmatively disclosed. Further indication of the lack of any criminal intent regarding the earlier letters mentioned above is the undisputed fact that Petitioner Cory promptly complied with the new disclosure law following its enactment. GX 128; Trial Tr. 9854. His disclosure in conformance with the new law occurred well before the indictment was handed down in the instant case.

[31] The testimony of the State Senators was to the effect that they were aware of the Racing Commission's practice and did not depend on the Commission's files for information as to the beneficial owners of racetracks; that they never inquired into the Marlboro ownership question beyond the information received from the Commission during the 1972 session, which is presumably when they would have wanted to know who the Marlboro owners were; and that they never conducted hearings in 1972 to determine the racetrack ownership, notwithstanding persistent rumors at the time that certain of the defendants in the instant case may have been financially involved. *See* Trial Tr. 4797-99, 4804-05, 4992-93, 5386-89, 7723-24, 7782-83, 7810-12, 7856-57.

information is, or at least should be, immaterial to their decisionmaking with regard to racetrack legislation. Indeed, these Senators testified that if they had known friends of the Governor were beneficial owners of Marlboro stock, whatever influence this might have had on their judgments would have related solely to political considerations, not to anything having to do with the merits of particular bills.[32]

While the federal prosecutors may have thought the Commission's non-disclosure practice unwise, petitioners Rodgers and Cory certainly were entitled to rely on this practice in filing the Marlboro stockholders' reports. Petitioner Rodgers explained at trial that because he was concerned about the political ramifications of disclosure, he asked his attorney, petitioner Cory, to verify that nominees could be used; Cory advised that the Commission had indeed confirmed that this practice was perfectly acceptable.[33] Thus, petitioners had every

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[32] Some State Senators testified that certain of the defendants below, for purely political reasons, might have been discriminated against in the vote on racetrack legislation had their identities been known, but such political considerations had nothing to do with the merits of particular bills. See Trial Tr. 7373-76, 4957-58.

[33] Petitioner Rodgers' testimony was that he did not want disclosed who owned the controlling interest in Marlboro because he thought certain state legislators would be politically motivated to vote against members of the group. Trial Tr. 10005-09. He and Petitioner Cory proceeded to follow the course of using nominees only after verifying with the Commission that such a practice was permissible and proper. Trial Tr. 10025-26.

reason to believe that the steps taken to protect the anonymity of beneficial ownership interests in the racetrack were lawful.[34]

The State of Maryland plainly has a legitimate interest in devising its own disclosure requirements for the regulation of racetracks within its borders. However ill-advised those requirements might seem to federal prosecutors, the mail fraud statute provides no legitimate authority for declaring criminal the nondisclosure of information to a state agency because such an accepted practice within the state "might offend the Government's personal [sense of] propriety." *United States* v. *McNeive,* 536 F.2d 1245, 1252 (8th Cir. 1976).

The Eighth Circuit so held in reversing a Section 1341 conviction of a state legislator, based on non-disclosure of his business relationship with private individuals. *United States* v. *Rabbit,* 583 F.2d 1014 (8th Cir. 1978). The court of appeals there correctly pointed out that the legislator was under no affirmative duty to disclose his interest because "the government referred to no standard of conduct applicable to legislators which clearly required disclosure of [the legislator's] interest in the [matter] * * *." *Id.* at 1024.

The Fourth Circuit's affirmance here, by divided vote, of the conviction of petitioners Rodgers and Cory

[34] As indicated at p. 10 *supra,* petitioner Cory's letters, far from manifesting criminal intent to defraud the Commission or the Assembly, conformed fully in form and content with the requirements of both of these state governmental bodies under the accepted practice in Maryland at the time.

is in direct conflict with the Eighth Circuit's decision in *Rabbit.* It also runs contrary to the clear warning sounded by Judge Friendly for the Second Circuit against prosecutorial overreaching under the federal mail fraud statute. *United States* v. *Dixon,* 536 F.2d 1388, 1400 (2d Cir. 1976). As in *Rabbit,* these petitioners were under no affirmative duty to disclose the questioned information; indeed, the accepted practice of the state agency involved, as fully recognized by the state legislature, established a standard for disclosure with which they fully complied. In such circumstances there can be no doubt that the trial court erred in failing to give a proffered instruction that compliance with state law was a defense to the mail fraud charges.

To be sure, Congress framed the mail fraud statute in broad terms, providing no precise definition for the phrase "scheme or artifice to defraud." *United States* v. *Mandel, supra,* 591 F.2d at 1360. However, even the most broadly framed penal statute must be construed in such a manner that it gives "fair warning" of the conduct proscribed. *See, e.g., Mourning* v. *Family Publications Services, Inc.,* 411 U.S. 356, 375 (1973); *United States* v. *Enmons,* 410 U.S. 396 (1973); *Grayned* v. *City of Rockford,* 408 U.S. 104, 108 (1972).

In the past, criminal prosecutions involving use of the mails under Section 1341 have been directed at conduct that is either in direct violation of another federal penal statute or some state law (*e.g., United States* v. *States,* 488 F.2d 761 (8th Cir. 1973), *cert. denied,* 417 U.S. 909 (1974)) or contrary to public policy and accepted moral standards (*United States* v. *Edwards,* 458 F.2d 875,880 (5th Cir. 1972), *cert. denied,* 409 U.S. 891 (1973)).

In this case, however, petitioners stand convicted for activity that was at the time in complete accord with an openly accepted practice of a State agency and State Legislature. Such a result has far-reaching implications. Routinely, members of the legal profession and business community are called upon to make legitimate judgments—no different from those made by petitioners in the instant case—about whether to include certain information in stockholders lists, financial statements, or other public releases, when the disclosure of such information is not required by law or public policy. If petitioners' convictions are allowed to stand, such disclosure decisions will be swept within the ambit of a loosely drawn penal statute, leaving to the federal prosecutors the power to define, in their discretion, what should have been disclosed in any particular case. Such a use of the mail fraud statute is precisely what the Eighth Circuit condemned in *United States* v. *Rabbit, supra,* 583 F.2d at 1024.[35] Review by this Court of the decision below is therefore warranted.

III. The Mail Fraud Convictions Of Petitioners Cannot Stand To The Extent That Those Convictions Depend On Bribery As An Element Of The Offense

As stated above, petitioners were not shown to have given, or to have made an attempt to give, bribes to Governor Mandel in an effort to obtain his assistance

[35] If, as indicated above, petitioners' specified non-disclosure of certain beneficial stockholders of Marlboro Racetrack in 1972 was insufficient to warrant prosecution and conviction under the federal mail fraud statute, their convictions on the racketeering charge (Count 24) under 18 U.S.C. § 1962, which depended upon the same allegations and evidence, must also be vacated. *See* panel decision below in *United States* v. *Mandel, supra,* 591 F.2d at 1376.

with racetrack legislation pending before the Maryland General Assembly. Indeed, insofar as the bribery allegations in the indictment are concerned, no evidence whatsoever was introduced at trial implicating petitioner Cory in such activity.[36]

Petitioner Rodgers, a long-time friend of Governor Mandel, was shown to have made gifts from time-to-time to the Governor over the course of six years (1970-75).[37] But no evidence was introduced to establish that these gifts were intended to, or did in fact, influence Governor Mandel's official action with respect to any matter. Significantly, neither a single witness nor a single trial exhibit supported the notion that Governor Mandel's actions with regard to racetrack legislation during the 1972 session of the General Assembly were in response to, or in exchange for, any benefit or favor conferred by petitioner Rodgers.

In these circumstances, petitioners were clearly entitled to a jury instruction on the law of bribery in connection with the mail fraud counts. *See* 591 F.2d

[36] Petitioner Cory was not a personal friend of Governor Mandel, nor was he involved professionally with the Governor. Trial Tr. 1725, 3216, 10619. During the relevant time period, Cory did not even meet with or speak to the Governor. Trial Tr. 6621-24, 9814-15, 9561-63. His reporting of certain ownership interests in Marlboro in the names of nominees was shown to have been done solely to protect the confidences of his clients, whom Cory represented in negotiations for the purchase of a controlling interest in the racetrack. Trial Tr. 10005-09, 10025-26. No suggestion was made at trial that Cory's conduct in this regard was intended to benefit the Governor, or did in fact inure to the Governor's benefit.

[37] See note 10 *supra.*

at 1365.[38] As stated in *United States* v. *Arthur,* 544 F.2d 730, 734 (4th Cir. 1976), "not every gift, favor or contribution to a government or political official constitutes bribery." The court of appeals there explained that what separates a "bribe" from other "goodwill expenditures" is "the notion of some more or less specific *quid pro quo* for which the gift or contribution is offered or accepted." *Id.*

This crucial distinction, however, was not explained to the jury in the instructions given under the mail fraud counts. *See* 591 F.2d at 1365 n.13. The government, in what can only be characterized as a complete turnaround, opposed such an instruction proffered by the defense and prevailed on its argument that bribery was not an element of the mail fraud charges. *Id.*[39]

Petitioners cannot express their frustration over such prosecutorial tactics any better than did Judge Widener in his dissenting statement from the equally divided vote of the court of appeals on rehearing *en banc.* As he there accurately pointed out, "throughout and until the end of the second trial, * * * [the government] continued to emphasize the importance of bribery in connection with [the mail fraud] counts by introducing a mass of evidence on the alleged flow of

[38] See Judge Widener's dissent below on rehearing *en banc* at 602 F.2d at 656, and the cases there cited.

[39] The trial court did instruct the jury on the law of bribery in connection with the anti-racketeering counts in the indictment; however, as explained in the majority opinion of the panel below (591 F.2d at 1365), and also in Judge Widener's separate dissent on rehearing *en banc* (602 F.2d at 655), the instruction in that connection did not cure the error in failing to give a separate bribery instruction on the mail fraud counts.

benefits to Governor Mandel from the other defendants in return for official preference." 602 F.2d at 654. All defendants were, by inference, implicated simply by virtue of their associations with one another, even if (as in petitioner Cory's case) they had no relationship with, and gave no gifts to, the Governor.

In light of this preoccupation with bribery at trial, it was indeed startling that the government resisted —successfully—defendants' requested instruction on the law of bribery under the mail fraud charge. 602 F.2d at 654-655. The jury was never properly advised that evidence of gifts or other benefits flowing to the Governor—as highlighted by the prosecution—were *not,* without more, sufficient to support a mail fraud conviction. *See United States* v. *Arthur, supra,* 544 F.2d at 734-35. Whether petitioners were found guilty on a misunderstanding of the law in this regard, or on the equally infirm ground that they failed to disclose beneficial stock ownerships in Marlboro to the Racing Commission (*see* pp. 19-26, *supra*) or on a combination of both, their convictions cannot stand.

Neither should the government be permitted on appeal to avoid reversal by returning once again—as it did in the court of appeals—to the bribery theory it so adroitly backed away from at the jury-instruction stage. Judge Widener's dissent below makes the point forcefully:

> The government cannot blow hot and cold at the same time. It cannot argue that bribery is not involved in the mail fraud counts at trial and secure a ruling to that effect from the trial judge in connection with the jury instructions and use that ruling as a basis for the argument to the jury that the "whole concept of bribery is relevant only

> in Counts 21 and 23" (the racketeering counts), and then on appeal shift completely its position and contend that an instruction on bribery was to be treated as given, even though such an instruction was not only not included in the instruction on the mail fraud counts but had been specifically ruled to be improper. *I cannot agree to such sophistry in a case where a defendant's right to fair trial is involved.*

602 F.2d at 655 (emphasis added).

This assessment needs little embellishment. "The error is not insubstantial; it is fundamental." *Id.* The prosecution of petitioners has throughout rested more on sleight of hand than on hard evidence. In some unspecified manner these petitioners were said to have participated in a nefarious scheme to corrupt Governor Mandel and thus deprive the citizens of Maryland of honest and disinterested government. Their "crime" in the final analysis was nothing more than guilt-by-association. As each theory advanced by the government against these petitioners foundered, the government offered a convenient reformulation of the alleged "fraudulent" conduct, abandoning positions at trial, only to revive them on appeal in an effort to bolster an obviously vulnerable jury verdict.

Such tactics are intolerable. Prosecutorial "gamesmanship" of this sort should be subjected to a full appellate review. In this case, however, the appellate process failed to perform that function. Review by this Court is more than appropriate, particularly in light of the clear recognition by half of the circuit judges actively sitting that egregious error was committed below.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

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PETITIONERS' REPLY MEMORANDUM

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1. In both this case and *Bulluck* v. *Washington,* 468 F.2d 1122 (D.C. Cir. 1972) (*en banc*), the order granting rehearing *en banc* "did not vacate the judgment of the division" (*ibid.*). The equally-divided *en banc* court in *Bulluck* held that it therefore had no power to alter the outstanding judgment of the panel. But the equally-divided *en banc* court in this case exercised that power by affirming petitioners' convictions although the judgment of the panel had set these aside. We had supposed the conflict between these courts of

appeals was clear and direct, but the government says there is "no merit" to such a view.[1]

According to the government, it matters greatly that the panel in *Bulluck* had affirmed the district court while the panel here had reversed.[2] But to accept that proposition one would have to conclude not only that *Bulluck* does not mean what it holds, but also that an equally-split federal court *has* the power to affect a judgment depending on what the judgment is and who rendered it—a notion totally at odds with a century and a half of federal adjudication.[3]

That history demonstrates one firm principle: no federal court, including an *en banc* court of appeals, has the power to alter an outstanding judgment without a majority vote.[4] The government says its position adheres to that principle because "An equal division of the *en banc* court of appeals means that a majority of the judges to have passed upon the issue (including the district judge) were in agreement with the ruling from which the appeal was taken."[5] But the equal

[1] Brief in Opp., at p. 19 n.12.

[2] *Ibid.* The government's idea apparently is that, despite *Bulluck*, an equally-divided *en banc* District of Columbia Circuit might find the power to affect an unvacated panel's judgment of reversal although the power is absent with respect to a panel's judgment of affirmance. We are left to wonder whether the power would be present or lacking when the panel has affirmed in part and reversed in part, sustaining for example convictions on some counts but reversing convictions on others.

[3] *See* our Petition (No. 79-1030), at pp. 16-18.

[4] As we pointed out in our Petition (79-1030), at pp. 16-17, this is why affirmance by an equally-divided court is merely a declaration of the deadlock, having no precedential value and having the same legal effect as if the proceeding—here the *en banc* rehearing—had never occurred.

[5] Brief in Opp., at p.18.

division means no such thing if, for example, the panel's majority in favor of reversal consisted of a judge sitting by designation, as frequently occurs. In that situation the government's head-count would result in a tie if the vote of the trial judge were given the same weight as a vote of a judge sitting on the court of appeals;[6] on the other hand, if one tallied only the votes of judges who heard the case on appeal, there would be a majority of one for reversal, yet the government would contend that the lower court judgment should be affirmed. Furthermore, when an *en banc* court of appeals splits evenly after a panel including one or two judges sitting by designation unanimously voted to set aside agency action upon direct review, the "majority" of judges who heard the case would favor the panel decision. But under the government's submission, the agency action would be allowed to stand because the panel's judgment was automatically vacated upon the grant of rehearing *en banc*.[7]

It is on this ground—that the grant of rehearing *en banc* "itself vacate[s] the panel decision"[8]—that the government's entire argument rests. It is a ground rejected in *Bulluck*, it has no statutory basis,[9] and the government has offered not a single reason[10] why this

[6] The judge sitting on the court of appeals by designation, who voted opposite of the district judge, would not be a member of the equally-divided *en banc* court of appeals. *See* 28 U.S.C. § 46(c).

[7] Brief in Opp., at pp. 18-19.

[8] Brief in Opp., at p. 18.

[9] *See* 28 U.S.C. § 46(c). The government itself recognizes as much earlier in its Brief in Opposition (see p. 16).

[10] The italicized quotation from Judge Waterman's dissenting opinion in *Farrand Optical Co.* v. *United States*, 317 F.2d 875,

should be the rule except to say that it is so.[11] On the other hand, we have pointed out [12] that a vote to grant rehearing *en banc* cannot also be considered a vote to vacate the panel's judgment, which is essentially a vote on the merits, as this Court recognized in *Moody* v. *Albermarle Paper Co.*, 417 U.S. 622, 627 (1974). Circuit judges in favor of the panel's decision may nevertheless vote for rehearing *en banc*. Indeed, when an equal division results, one can usually assume with assurance that at least one of the judges who made up the majority voting for rehearing *en banc* agreed with the panel's disposition.

In the absence of an announced rule, there is thus no basis to suppose that a majority of the active circuit judges not only voted to grant *en banc* review but also decided to set aside the panel's judgment. The Fourth Circuit, like most of the courts of appeals, has no such rule, its order granting rehearing *en banc* did not va-

886 (2d Cir. 1972), at p. 18 of the government's Brief in Opposition, says only that it is "obvious" that a grant of rehearing *en banc* has this result.

[11] The government states (Brief in Opp. p. 17 n.11) that in light of his dissenting opinion in *Drake Bakeries, Inc.* v. *Local 50*, 294 F.2d 399 (2d Cir. 1961), *aff'd on other grounds*, 370 U.S. 254 (1962), when the equally-divided *en banc* court, by a 4-2 vote, affirmed the district court rather than the panel, and his silence when a somewhat different result occurred in *Farrand Optical* v. *United States, supra*, Judge Friendly must have changed his view concerning the effect of a tie vote. We think this demonstrates only that Judge Friendly decided to adhere to the principle of *stare decisis*, particularly since the deadlocked *en banc* court in *Farrand Optical* sent the case back to the court of appeals panel to consider the appellate issues it had not reached in its original decision.

[12] *See* Petition (No. 79-1030), at p. 18.

cate the panel's decision and its tie vote therefore could not affect that decision, which should have been affirmed.

2. Insofar as the government's case against these petitioners depended upon non-disclosure of certain beneficial owners of Marlboro Racetrack, we have previously explained our legal position that petitioners did not thereby violate the mail fraud statute. Petition (79-1030), at pp. 19-26. Instead of addressing the fundamental statutory construction question raised in our petition, the government recounts the evidence in an attempt to make it appear that the statutory issue is not properly presented.

With respect to these petitioners, however, the mail fraud issue cannot be dismissed as nothing but a factual dispute about the weight of the evidence. The evidence relating to this issue is not in dispute. As the Government points out, petitioner Cory withheld from the State Racing Commission the identities of Hess, Kovens and the Rodgers brothers as beneficial owners (Brief in Opp., at pp. 7, 33-34). It is not disputed that he did so intentionally in responding to official inquiries about the beneficial ownership of Marlboro Racetrack (Brief in Opp. at p. 34). In fact, petitioner Cory explicitly advised Racing Commissioner Jackson that he could not disclose the ownership interests of his clients because of ethical constraints imposed on him by the attorney-client relationship (Tr. 6205-07). He thus reported these ownership interests in the names of nominees, including himself as "Attorney," Petition (79-1030), at p. 20, with the affirmative representation that none of the beneficial owners of Marlboro Racetrack was involved in a criminal enterprise or book-

making (*id.* at 21). Not only was this the standard reporting practice that had long been acceptable to the Maryland State Racing Commission (*id.* at 21-22), but the Attorney General of the State had advised the Racing Commissioner not to insist on further disclosure from petitioner Cory in light of the attorney-client relationship (Tr. 6207).

It is not a sufficient answer in these circumstances for the government to assert simply that there was intentional concealment of information in response to official inquiries. That is conceded. However, the court of appeals in *United States* v. *Rabbit,* 583 F.2d 1014, 1024 (8th Cir. 1978), clearly held that purposeful nondisclosure was not reachable under the mail fraud statute when the individual withholding information was under no affirmative duty to disclose.[13] And that, we submit, was the situation here. Petition (79-1030), at pp. 23-25. Indeed, not only was there no affirmative disclosure obligation, but also well-recognized ethical constraints inherent in the attorney-client relationship between petitioner Cory and the beneficial owners he represented counselled against revealing their identities. To hold that such conduct violates the mail fraud statute extends that criminal provision well beyond any recognized bounds of statutory construction and thus demands the attention of this Court.

3. Because the trial judge gave an instruction on bribery with respect to two of the racketeering counts (Counts 21 and 23), the government argues that the

[13] A majority of this Court has recently recognized the importance in a criminal context of establishing an affirmative duty to disclose when the prosecution for fraud rests on evidence of nondisclosure. *Chiavella* v. *United States,* No. 78-1202, 48 L.W. 4250 (March 18, 1980).

failure to include a bribery instruction in connection with the mail fraud counts is of no material consequence (Brief in Opp., at pp. 24-27). Insofar as petitioners Rodgers and Cory are concerned, this position is untenable.

Neither of these petitioners was indicted under Count 21, and petitioner Cory was also *not* indicted under Count 23.[14] In its instructions, the district court explicitly advised the jury that the charges given on Counts 21 and 23 were meant to refer only to the defendants named in those counts (Tr. 11481-82). There is thus nothing to the government's argument that the bribery instruction in connection with the two racketeering counts was readily transferable (albeit *sub silento*) to the mail fraud counts on which these petitioners were indicted.

Rather, in the circumstances of this case, the failure to give a separate bribery instruction under the mail fraud counts was clear error in regard to these petitioners. As the government acknowledges, the theory of the mail fraud prosecution "*included* bribery as one of the ways in which fraud was committed" (Brief in Opp., at pp. 25-26 n.19; emphasis in original). Thus, at least with respect to one of the two theories advanced by the prosecution, bribery was treated as an element of the mail fraud offense.[15] As such, the district court was under an affirmative obligation to include an in-

[14] While petitioner Rodgers was indicted under Count 23, the district court entered a judgment of acquittal on this count. Petition (79-1028) App. 18a-19a n.3.

[15] *See United States* v. *Mandel,* 591 F.2d 1347, 1365 (1979); *see* also Judge Widener's dissent below on rehearing *en banc* at 79-1028 Pet. App. 5a-8a.

struction on bribery in its mail fraud charge even if not requested to do so. *E.g., United States* v. *Schmidt,* 376 F.2d 751 (4th Cir.), *certiorari denied,* 389 U.S. 884 (1967). When, as here, such a request *was made* by the defendants, the failure to give the instruction is reversible error. *See* Judge Widener's dissent below on rehearing *en banc* at Petition (79-1028) App. 8a-9a, and the cases there cited.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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